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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

SAMSON E. SHONDE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the district court had "inherent authority" to vacate respondent's guilty plea and dismiss the underlying indictment because it believed that respondent's conviction might affect his immigration status.

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v.

SAMSON E. SHONDE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-3a) is reported at 803 F.2d 937. The order of the court of appeals denying rehearing (App., *infra,* 7a) is reported at 815 F.2d 475. The oral opinion and written order of the district court (App., *infra,* 19a-24a, 4a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 6a) was entered on October 16, 1986. A petition for rehearing was denied on March 23, 1987 (App., *infra,* 7a). On June 12, 1987, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including July 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1251 provides, in pertinent part:

> (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who –
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement, or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * *
>
> (b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

STATEMENT

1. Respondent entered the United States in 1974 on a temporary immigration visa. In 1984, he owned and operated a grocery store in St. Paul, Minnesota. He was indicted by a federal grand jury in August of that year and charged with three counts of unlawfully dealing in federal

food stamps, in violation of 7 U.S.C. 2024(b). Akinsanya A. Cole was named as respondent's co-defendant in Counts One and Two of the indictment. App., *infra*, 2a.

On October 16, 1984, respondent pleaded guilty to Count Two of the indictment, which involved a discounted cash purchase of food stamps from an undercover agent of the Department of Agriculture. Respondent pleaded guilty pursuant to an agreement that the other two counts would be dismissed and that the maximum term of imprisonment the court would impose was six months. The United States further agreed not to object to work release as an alternative to imprisonment and that no fine would be imposed, although restitution was to be in the discretion of the court. See App., *infra*, 8a-9a. At the plea hearing respondent admitted that he bought food stamps having a face value of $1,005 for $65 in cash. Respondent further acknowledged that he knew at the time that what he was doing was wrong. *Id.* at 9a-10a. After assuring itself that the plea was knowingly and voluntarily entered, the court accepted it (*id.* at 9a-11a).

2. On the same day that respondent pleaded guilty, his co-defendant, Akinsanya Cole, went to trial on Counts One and Two. The evidence at that trial showed that respondent enlisted Cole to assist him in purchasing food stamps on two occasions. On the second day of trial, however, it became clear that the government was not going to prove that Cole received any money for his part in these transactions. As a consequence, the district court dismissed the case. The presiding judge, the Honorable Miles Lord, stated to the prosecutor: "You could technically make out a case, but it would get no sentence. All he would have is a conviction on his record and get deported." App., *infra*, 13a. The court then explained to the jury the reason for its mid-trial dismissal of the charges against Cole (App., *infra*, 13a-14a). Because that dismissal influenced the court's ultimate disposition of respondent's case, we set out those remarks in some detail.

The court began by telling the jury that "[a] Judge has supervision over law enforcement" and that he had personally "concluded that in this instance the penalty does not fit the crime." App., *infra*, 13a. The court noted that there was no proof that defendant Cole was to get any money from the transactions or that these two instances were part of "a pattern of conduct on his part." Rather, he was just helping out a fellow countryman and deportation was too severe a penalty for that. The court continued (App., *infra*, 14a):

> There may be welfare cheaters. This man is not on welfare. He monkeyed with this thing. He should not have done that.
>
> But if he were convicted, I would not punish him severely—you know it would be some nominal sentence.
>
> Really the focus was on the grocery man [*i.e.*, respondent].

Judge Lord noted that the jury could "agree with me or disagree with me—it does not make any difference because I have already dismissed the case, you see—but if there is another case and he's back in there, they will get him again." The court concluded by stating: "I have overruled the judgment of the U.S. Attorney in this instance, so the case is over." App., *infra*, 14a.

3. On December 6, 1984, the court sentenced respondent to two years' probation and ordered him to make restitution to the Department of Agriculture in the amount of $746 (App., *infra*, 17a-18a). In addition, at the request of respondent's counsel and pursuant to 8 U.S.C. 1251(b)(2), the court directed that respondent not be deported as a consequence of his conviction (App., *infra*, 18a).[1] The court elaborated on the reasons for, as well as

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[1] Under 8 U.S.C. 1251(a)(4), the Attorney General is directed to deport any alien convicted either of two separate crimes involving moral turpitude or of one crime involving moral turpitude where that

the implications of, its order (*ibid.*):

> Now I have indicated that I would indicate to the Immigration Department and order them not to deport you. If that punishment is to follow—if they are to deport him—I will entertain a motion to dismiss this plea of guilty—to withdraw it—and at that point I will dismiss the charges; because I didn't like the way, I didn't think it was fair the way the Department of Agriculture went about this whole process. That's why I dismissed the other person [*i.e.*, co-defendant Cole].

The court's judgment order contained a specific provision noting: "[T]he defendant is not to be deported under this Court's authority provided in Title 8, United States Code, Section 1251(b). If any deportation proceedings arise in the future, this Court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge." Judgment and Probation/Commitment Order, Crim. No. 4-84-74(01) (D. Minn. Dec. 6, 1984).

4. On February 26, 1985, respondent, who had overstayed his immigration visa, was ordered to show cause why he should not be deported. By that time, however, respondent was married to an American citizen, and his wife had petitioned to have his status readjusted to that of permanent resident based on the marriage. The immigration judge therefore dismissed the deportation proceedings on April 23, 1985, and remanded the case to the district director for disposition of respondent's adjustment of status application. App., *infra,* 2a.

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crime is "committed within five years after entry" and the alien is "sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more." The sentencing court may, however, direct that Subsection (a)(4) not apply to the conviction at issue. 8 U.S.C. 1251(b)(2).

Notwithstanding the dismissal of the deportation proceedings, respondent subsequently moved in district court under 28 U.S.C. 2255 for the vacation of his conviction and the dismissal of the indictment. In his pleadings, respondent conceded that he was "not being deported because of this conviction" and, indeed, that the deportation proceedings had been dismissed. Motion to Vacate Plea of Guilty and to Dismiss the Charge, Crim. No. 4-84-74(01) (May 21, 1985). See also App., *infra,* 22a-23a. He claimed, however, that "the conviction is an adverse factor which may be considered in exercising discretion * * * in connection with defendant's adjustment of status application" (Motion to Vacate Plea, *supra*).[2]

5. The district court vacated the guilty plea and dismissed the indictment. At an oral hearing on July 2, 1985, the court rejected the government's argument that there was nothing to indicate that respondent would be deported and that, in any event, the court's order could be enforced against INS without the "drastic remedy" of vacating the plea and dismissing the indictment. The court responded (App., *infra,* 22a):

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[2] As an additional reason for dismissing the charges, respondent alleged that the indictment was insufficient to state an offense under this Court's decision in *Liparota* v. *United States,* 471 U.S. 419 (1985). In *Liparota,* the Court held that to prove an offense under 7 U.S.C. 2024(b), the government must show that the defendant knew that his actions were unlawful. Respondent claimed that no such allegation was contained in his indictment. That claim was never addressed by either the district court or the court of appeals.

The indictment, in any event, specifically charged that respondent "knowingly and intentionally" violated the Food Stamp Act. Furthermore, at his plea allocution respondent acknowledged that he knew what he was doing was wrong at the time he did it. His guilty plea therefore conformed to the requirements of *Liparota* and to prior case law from the Eighth Circuit, which *Liparota* followed. See *Liparota,* 471 U.S. at 423 n.4.

> I think that my sentence leaves the Immigration people in a posture where they can do it if they want to, and that my only remedy—I cannot enjoin them from following what they see to be their duty; if they see it to be their duty to use that conviction and to disregard my language, my only remedy is to dismiss the conviction—and that is permanent.

The court explained the reasons for its action in some detail (App., *infra,* 21a):

> Do you know what's bothering me? Shonde is a pretty good fellow. I think he's a good citizen and—he'll be a good citizen.
>
> We want to deport him.
>
> Then we have a little skunk like the man who just left here, who has never done anything right in his whole life, and we give him free board and room for four or five years and support five of his children by five different women. We should have a deportation mechanism for men like him.
>
> But Shonde here is—I think he'll be a good citizen, a conscientious person, and bright, intelligent, decent.
>
> * * * * *
>
> And now we're going to send him off. We won't have a friend here or there.

The court noted that it had dismissed the case against respondent's co-defendant "on the basis that I didn't think the facts sustained a conviction" (App., *infra,* 23a). At that point, the prosecutor interposed and explained to the court that in fact "you felt that the government had proved its case and that he had done something that he shouldn't have done, but you felt that the penalty was too great in that regard in that case, and you dismissed on those grounds" (*ibid.*). The court stated, "All right, I remember that now," but nonetheless continued (App., *infra,* 24a):

> Well, here is what I am going to do—and I don't think anybody is going to be particularly injured by it.
>
> On the basis of the information that was disclosed during the trial of this case, I conclude that the facts were not sufficient to sustain a conviction of this defendant, and I vacate the plea and dismiss the case.
>
> He's been punished—the punishment that is coming to him he's had already—and the administrative proceeding that followed.
>
> The conviction on the record is not representative of what I believe to be the man's character, and therefore the conviction is eradicated.

A formal order vacating respondent's guilty plea and dismissing the indictment was entered on July 24, 1986 (App., *infra,* 4a-5a).

6. On the government's appeal from the dismissal order, the court of appeals affirmed (App., *infra,* 1a-3a). Without citing any authority for its decision, the court concluded that the district court had "inherent authority" to condition the judgment of conviction on respondent's not being deported and, when that condition was breached, the court was justified in vacating the guilty plea and dismissing the indictment. The court of appeals' entire discussion of the issue was as follows (App., *infra,* 3a):

> Without regard to the district court's authority under [8 U.S.C.] 1251(b)(2), the district court had the inherent authority to enter its order stating it would reconsider its judgment if deportation proceedings were initiated by the government. Because the government breached the order by bringing deportation proceedings, it was appropriate for the district court to entertain [respondent's] motion to vacate his plea of guilty and dismiss the indictment.

The court of appeals denied the government's request for rehearing en banc, with five judges dissenting (App., *infra,* 7a).

REASONS FOR GRANTING THE PETITION

The district court in this case arrogated to itself powers that are not judicial, but are reserved for the Executive Branch. In that regard, the district court committed three serious errors. First, the court improperly set aside the judgment of conviction because the immigration authorities took steps, subsequently withdrawn, to deport respondent. Second, the court improperly permitted a collateral attack on a voluntary and intelligent plea of guilty. Third, the court took the drastic step of dismissing an indictment in a case that did not even remotely fit within the limited class of cases in which that remedy is justified.

The court of appeals approved each of these steps as being within the discretionary authority of the district court. In fact, however, as this Court has made clear, a district court may not vacate convictions and dismiss criminal charges simply because the court questions the wisdom of a particular prosecution decision or disagrees with other steps the Executive Branch has taken against a defendant. The district court's action in this case—fully sanctioned by the court of appeals—reflects a disregard for the limits on a court's authority over a criminal prosecution.

The view of judicial authority taken by the courts below would permit a district court to upset a valid judgment of conviction and even dismiss a prosecution altogether because the court disagrees with the prosecutor's charging decision, or because the district court objects to the government's treatment of the defendant in other respects. This Court has repeatedly held that a district court's role in the criminal process does not extend that far. The Court should grant certiorari to reaffirm that the separation of powers does not authorize a district court to exercise free-wheeling power to upset valid convictions and dismiss charges brought by the Executive Branch whenever the court feels that it is in the general interest of justice for it to do so.

1. The power of a district court to enter judgment against a criminal defendant is exclusively statutory in nature. The court cannot impose a greater or lesser punishment than sanctioned by the legislature. There is no "inherent authority" to structure a sentence except as provided in the applicable statutory grant of authority. *Ex Parte United States,* 242 U.S. 27, 42 (1916); *United States* v. *Haile,* 795 F.2d 489, 492 (5th Cir. 1986); *United States* v. *John Scher Presents, Inc.,* 746 F.2d 959, 961 (3d Cir. 1984); *United States* v. *Missouri Valley Const. Co.,* 741 F.2d 1542, 1546 (8th Cir. 1984) (en banc); *United States* v. *Cohen,* 617 F.2d 56, 58 (4th Cir.), cert. denied, 449 U.S. 845 (1980).

Under the statute applicable to this case, 7 U.S.C. 2024(b), a court may impose for a first felony conviction a term of imprisonment of up to five years and a fine of up to $10,000, as well as barring the defendant from further participation in the food stamp program. Alternatively, the court may "withhold the imposition of the sentence on the condition that [the defendant] perform * * * work assigned by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted." 7 U.S.C. 2024(b)(2). Neither Section 2024 nor the general provisions governing sentencing, 18 U.S.C. (& Supp. III) 3561 *et seq.;* Fed. R. Crim. P. 32-36, authorize a judgment conditioned on any other factors.

Nor does 8 U.S.C. 1251(b)(2) authorize the imposition of a conditional judgment. Section 1251(b)(2) simply allows a court to make a binding recommendation that a defendant not be deported under the terms of Section 1251(a)(4) because of his conviction. That recommendation has no bearing on the remainder of the sentence, and the court is not authorized to condition its judgment upon compliance with the Section 1251(b)(2) recommendation.

As respondent himself acknowledged before the district court (App., *infra,* 22a-23a), the deportation proceedings at issue here were not commenced under Section 1251(a)(4). They were not based in any way on his conviction. Rather, they were commenced because respondent had overstayed his immigration visa. Thus, there was no violation of the court's recommendation.[3] But even if a violation had occurred—even if, that is, INS had sought to deport respondent under Section 1251(a)(4)—respondent's remedy would lie in an appeal from the deportation order, not in a collateral attack on his conviction. See, *e.g., Delgado-Chavez* v. *INS,* 765 F.2d 868 (9th Cir. 1985); *Cerujo* v. *INS,* 570 F.2d 1323 (7th Cir. 1978); *Giambanco* v. *INS,* 531 F.2d 141 (3d Cir. 1976).

More generally, it is well established that a district court does not have "inherent authority" to condition the finality of a criminal judgment on future events unrelated to the prosecution. Nor can the court enforce such a condition by permitting a collateral attack on the conviction if the condition is not satisfied. See *United States* v. *Huss,* 520 F.2d 598 (2d Cir. 1975) (28 U.S.C. 2255 not available to challenge conditions of confinement); *Freeman* v. *United States,* 254 F.2d 352, 353-354 (D.C. Cir. 1958) (same for manner in which sentence is executed); *Costner* v. *United States,* 180 F.2d 892 (4th Cir. 1950) (same for calculation of good time credits). Cf. *United States* v. *Dragna,* 746 F.2d 457 (9th Cir. 1984) (reversing district court's reduc-

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[3] Even without the court's order, respondent could not have been deported under Section 1251(a)(4). The instant case was his only criminal conviction. Furthermore, the crime was committed more than five years after respondent's entry into the United States, and respondent was not sentenced to a term of imprisonment exceeding one year. Thus, Section 1251(a)(4) by its own terms could not have been applied to respondent.

We are informed by INS that respondent was granted permanent resident status on June 16, 1986, at the behest of his American wife. Thus, he no longer faces possible deportation.

tion of sentence under Rule 35(b) based on frustration of court's intent as to where defendant would be confined), cert. denied, 469 U.S. 1211 (1985). The decision of the courts below "confer[s] on the judiciary discretionary power to disregard the considered limitations of the law that it is charged with enforcing." *United States* v. *Payner,* 447 U.S. 727, 737 (1980). "[T]he supervisory power does not extend so far." *Ibid.*

In *United States* v. *Addonizio,* 442 U.S. 178 (1979), this Court held that a postsentencing change in the policies of the Parole Commission that prolonged the defendant's actual imprisonment beyond the period intended by the sentencing judge did not support a collateral attack on the original sentence under 28 U.S.C. 2255. The district court in that case, upheld by the court of appeals, concluded that its "sentencing expectations" were frustrated by the Parole Commission's subsequent adoption of new standards and procedures. The court therefore changed the defendant's sentence to "time served." This Court reversed, stressing the narrowly limited grounds on which a collateral attack on a final judgment may be based (442 U.S. at 186):

> The claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

The same is true in the instant case. There is no claim of any constitutional violation. The sentence respondent received was well within the statutory limits. And no finding was made that the guilty plea and sentencing proceedings were in any way infected with legal or factual error,

whether fundamental or otherwise. Under these circumstances, the sentencing judge's intentions concerning respondent's immigration status will not support a collateral attack on the judgment.

The Court stressed in *Addonizio* that, with certain limitations, Congress had given the Parole Commission the responsibility of deciding when to release a lawfully sentenced defendant (442 U.S. at 188). Under the statutory scheme, the sentencing judge has no enforceable expectations with respect to the actual release date of a sentenced defendant short of his statutory term. "The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met" (*id.* at 190). Thus, the only remedy of the defendant from a decision of the Parole Commission denying him parole is on review of that decision, not in a collateral attack on his sentence (*id.* at 187, 190).

The same principles apply here. Congress has, with certain limitations, committed immigration decisions to the initial discretion of the INS. A judge sentencing a criminal defendant may have certain expectations as to the effect of the conviction on his immigration status; under Section 1251(b)(2), the district court may even direct that the conviction not be used as the basis for deportation under Section 1251(a)(4). But the actual immigration decision is wholly separate from the judgment of conviction, and the only remedy available to a defendant who is subsequently ordered deported is on review of the deportation order, not in a collateral attack on his judgment of conviction. By treating the judgment in this case as a conditional judgment that the court could revoke at any time it believed the conditions were not satisfied, the district court violated basic principles of the law of criminal judgments, as set forth by this Court in *Addonizio*. That departure from important and settled principles of law is, in itself, sufficient to warrant this Court's review.

2. Even if the deportation proceedings had provided some basis for the district court to reconsider its prior judgment, there would still be no justification for the court's decision to vacate respondent's guilty plea. This Court has continually stressed that a voluntarily entered guilty plea may not be set aside in a collateral proceeding. As the Court stated in *Mabry* v. *Johnson,* 467 U.S. 504, 508 (1984), "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." See also *Tollett* v. *Henderson,* 411 U.S. 258, 266-267 (1973); *North Carolina* v. *Alford,* 400 U.S. 25, 31 (1970); *Parker* v. *North Carolina,* 397 U.S. 790, 797-798 (1970); *McMann* v. *Richardson,* 397 U.S. 759, 772 (1970); *Brady* v. *United States,* 397 U.S. 742, 747-748 (1970).

There was no claim in this case that respondent's plea was uncounseled or that it was not voluntarily and intelligently entered. Respondent's guilty plea fully complied with the requirements of Rule 11 of the Federal Rules of Criminal Procedure (App., *infra,* 8a-11a), and there has never been any allegation that the plea was not informed and consensual. Respondent's plea agreement with the government was not conditioned in any way on a promise that he would not be deported. App., *infra,* 8a-9a. The issue was not even raised until the sentencing hearing, when respondent's counsel requested a recommendation from the court under Section 1251(b)(2). App., *infra,* 17a. In any event, even if the non-deportation recommendation under Section 1251(b)(2) could somehow be construed as a condition of the plea agreement, that condition could be enforced without disturbing the guilty plea. See *Santobello* v. *New York,* 404 U.S. 257, 263 (1971). Since "[i]t is only when the consensual character of the plea is called into question that the validity of the plea may be impaired," *Mabry* v. *Johnson,* 467 U.S. at 509, the subsequent deportation proceedings provided no grounds for vacating respondent's guilty plea.

One other justification offered by the district court in support of its action—although ignored by the court of appeals in sustaining that action—was that, after sitting through the trial of respondent's co-defendant, the district court concluded that "the facts were not sufficient to sustain a conviction of this defendant" (App., *infra,* 24a). Even assuming, however, that the district court intended to rely in part on that ground,[4] it was an improper one. It is well established that "a counseled plea of guilty is an admission of factual guilt so reliable that * * * it *quite validly* removes the issue of factual guilt from the case." *Menna* v. *New York,* 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis in original). More specifically, a defendant is not "permitted to disown" a plea merely because, in retrospect, the defendant concludes that the government might have had difficulty in factually proving its case. *Brady* v. *United States,* 397 U.S. at 757.

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[4] In fact, it is clear from the court's comments as a whole that the court acted as it did not based on any concerns about the sufficiency of the evidence, but simply because it considered respondent "a pretty good fellow" who would make "a good citizen" and who had been punished enough for his wrongdoing. App., *infra,* 23a. Even with respect to co-defendant Cole, the court never concluded that the evidence was insufficient to sustain a conviction. Rather, the court said that the government "could technically make out a case," but that "the penalty does not fit the crime" (App., *infra,* 13a). The reason the court gave for that conclusion was that *respondent* was actually the party principally responsible for the crime: "Really, the focus was on the grocery man" (App., *infra,* 14a).

Thus, it is clear from the court's comments at the time of the co-defendant's trial that the court did think the facts were sufficient to sustain a conviction of respondent. Furthermore, Rule 11(f), Fed. R. Crim. P., authorizes a court to accept a guilty plea only if it is "satisf[ied] * * * that there is a factual basis for the plea." The district court assured itself in this case that respondent's plea had a factual basis. App., *infra,* 9a-11a. Respondent admitted that he bought the foodstamps for cash at a discount off their face value and that he knew it was wrong at the time he did it. App., *infra,* 9a-10a. No further factual predicate was required to make out a violation of 7 U.S.C. 2024(b). *Liparota* v. *United States,* 471 U.S. at 432.

On this issue as well, this case warrants review. Just as a court may not upset a valid conviction absent error in the proceedings leading to that conviction, a court may not vacate a guilty plea on collateral attack absent a fundamental error in the proceedings leading to the acceptance of the plea. See *United States* v. *Timmreck,* 441 U.S. 780, 783 (1979); Cf. *Hill* v. *United States,* 368 U.S. 424 (1962). The decision of the courts below on this issue departs so sharply from the role assigned to courts in addressing collateral challenges to guilty pleas that this Court's review is clearly called for.

3. The final step taken by the district court in this case—dismissal of the indictment—took the court into the realm that the Constitution reserves for the Executive Branch. Aside from its brief allusion to the sufficiency of the evidence, the district court did not even suggest a judicial basis for its decision. Instead, it simply expressed and then acted upon its opinion that the prosecution of this case was not in the public interest. "The conviction on the record," the court explained, "is not representative of what I believe to be the man's character, and therefore the conviction is eradicated" (App., *infra,* 24a). The district court, in short, "overruled the judgment of the U.S. Attorney" (App., *infra,* 14a).

In our constitutional system, prosecution decisions are committed to the Executive Branch. *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978). District courts do not possess any authority to dismiss an indictment on the grounds that the defendant is a "pretty good fellow." On the contrary, it is well established that whatever "supervisory power" over law enforcement a court might have, that power does not arm "the federal judiciary with a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve." *United States* v. *Russell,* 411 U.S. 423, 435 (1973). As the Court stated in *Russell* (*ibid.*):

> The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

The court of appeals attempted to justify the district court's action by reference to its "inherent power" to respond to the government's breach of the court's nondeportation order. Even if, however, one accepts the court of appeals' premise—that the government breached a lawful court order by commencing deportation proceedings against respondent—dismissal of the indictment was not a legitimate response. The sanction appropriate to such misconduct must be "narrowly tailored" and "approached 'with some caution,' " taking full account of the government's legitimate interest in prosecution. *United States* v. *Hasting,* 461 U.S. 499, 506-507 (1983) (quoting *United States* v. *Payner,* 447 U.S. at 734). Dismissal of an indictment is "extraordinary relief," *United States* v. *Morrison,* 449 U.S. 361 (1981), which is appropriate only in extremely limited situations. This Court stressed in *Morrison,* 449 U.S. at 365, that "absent demonstrable prejudice, or substantial threat thereof, dismissal of [an] indictment is plainly inappropriate, even though the violation may have been deliberate." There has never been any suggestion that the deportation proceedings at issue here could in any way have prejudiced respondent's criminal prosecution. It follows that even if those proceedings did somehow violate respondent's rights, the district court had no authority to dismiss the indictment as a remedy for that violation.

The decision of the court of appeals in this case works an unprecedented shift of authority to determine whether and against whom criminal charges should be brought, from the Executive Branch (and the grand jury), where it has heretofore resided, to the district courts. That decision

conflicts with decisions of other circuits which reversed similar usurpations of power by district court judges. See, *e.g.*, *United States* v. *Cannon*, 778 F.2d 747 (1985), after remand, 807 F.2d 1528 (11th Cir. 1986) (guilty plea to firearms violation vacated by district court and judgment of acquittal entered on grounds that, in district court's view, defendant should not be deprived of his right to possess hunting weapons); *United States* v. *Gonsalves*, 781 F.2d 1319 (9th Cir. 1985) (indictment dismissed by district court on grounds that the trial would be too complex and burdensome); *United States* v. *Valle*, 697 F.2d 152 (6th Cir.) (indictment dismissed by district court on grounds that prosecutorial resources would better be allocated elsewhere), cert. denied, 461 U.S. 918 (1983); *United States* v. *Hudson*, 545 F.2d 724 (10th Cir. 1976) (indictment dismissed by district court on grounds that the defendant was ill).

At bottom, what the district court did in this case, with the blessing of the court of appeals, was to grant respondent a pardon. Pardons are the prerogative of the Executive. *Schick* v. *Reed*, 419 U.S. 256, 266-267 (1974); *Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925). This Court should grant review in this case to reaffirm that important principle and to ensure that district courts are not permitted to assume a general supervisory role over prosecution decisions that are strictly the responsibility of the grand jury and the United States Attorney.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL K. KELLOGG
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

JULY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5282

UNITED STATES OF AMERICA, APPELLANT

v.

SAMSON E. SHONDE, APPELLEE

Appeal from the United States District Court
for the District of Minnesota

Submitted: April 15, 1986

Filed: October 16, 1986

Before LAY, Chief Judge, McMILLIAN, Circuit Judge,
and HANSON,* Senior District Judge.

HANSON, Senior District Judge.

The government appeals the order of the district court,[1] pursuant to 28 U.S.C. § 2255, vacating the guilty plea of defendant/appellee Shonde. We affirm.

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*The HONORABLE WILLIAM C. HANSON, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] The HONORABLE MILES W. LORD, Judge of the United States District Court for the District of Minnesota, retired September 11, 1985.

Samson Shonde is a 42-year-old Nigerian who has lived in the United States since 1974. On August 22, 1984, Shonde and Akinsonya A. Cole were indicted in a three-count indictment for unlawful dealing in food stamps in violation of 7 U.S.C. § 2024(b) and 18 U.S.C. § 2. Shonde pleaded guilty to Count II of the indictment on the same day Cole's trial began. On the following day the district court dismissed the case against Cole, concluding the evidence would not sustain a conviction. At a sentencing hearing on December 6, 1984 Shonde was ordered to pay restitution and received two years' probation. The district court also ordered that Shonde not be deported, and that if any future deportation hearing arose, the court would entertain a motion from the defendant to vacate his plea of guilty and dismiss the indictment.

On February 26, 1985 Shonde was ordered to appear before the Immigration and Naturalization Service to show cause why he should not be deported. The hearing was continued to April, pending the outcome of his I-130 petition (a petition filed on his behalf by an immediate family member). On April 23, 1985, the immigration judge dismissed the deportation hearing and remanded the case to the district director for disposition of Shonde's Adjustment of Status application. Shonde thereafter brought a motion before the district court to vacate his guilty plea and dismiss the charge against him as had been stated in the district court's order at the sentencing hearing. Thereafter the district court issued an order vacating Shonde's plea of guilty and dismissing the indictment against him.

The government brings this appeal, asserting that the district court erred in vacating Shonde's guilty plea and in dismissing the indictment. The basis of this appeal is the government's assertion that the district court acted beyond its authority to recommend against deportation, as set out in 8 U.S.C. § 1251(b)(2), in vacating the conviction and

dismissing the indictment. The government argues that the district court had no authority under § 1251(b)(2) because at the time no deportation proceeding was pending against Shonde. We do not agree. Without regard to the district court's authority under § 1251(b)(2), the district court had the inherent authority to enter its order stating it would reconsider its judgment if deportation proceedings were initiated by the government. Because the government breached the order by bringing deportation proceedings, it was appropriate for the district court to entertain Shonde's motion to vacate his plea of guilty and dismiss the indictment.

We would therefore affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Criminal No. 4-84-74(01)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

SAMSON E. SHONDE, DEFENDANT.

James M. Rosenbaum, U.S. Attorney, by Paul A. Murphy, Assistant U.S. Attorney, 234 U.S. Courthouse, Minneapolis, Minnesota 55401, for plaintiff.

Susan E. Conley, Centro Legal, 179 E. Robie, St. Paul, Minnesota 55107, for defendant.

[Filed July 24, 1985]

ORDER

This matter came before me, the undersigned Senior Judge of the District Court, on July 2, 1985, upon defendant Samson F. Shonde's motions pursuant to section 2255 of Title 28 of the United States Criminal Code to dismiss the indictment against him brought under Title 7, United States Code section 2024(b) and to vacate his plea of guilty of December 6, 1984. Paul A. Murphy, Assistant U.S. Attorney, appeared for plaintiff, Susan E. Conley appeared for defendant.

Based upon all the files, records, and proceedings herein, and upon the arguments of counsel, IT IS HEREBY ORDERED That:

1) Defendant's motion to vacate his guilty plea entered before this court on December 6, 1984, be and is granted, and the plea is vacated;

2) Defendant's motion to dismiss the indictment against him under Title 7, United States Code section 2024(b) be and is granted.

IT IS SO ORDERED.

Dated: July 22, 1985

/s/ MILES W. LORD
Miles W. Lord
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5282MN

UNITED STATES OF AMERICA, APPELLANT,

v.

SAMSON E. SHONDE, APPELLEE.

Appeal from the United States District Court
for the District of Minnesota

[Filed Oct. 16, 1986]

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5282-MN

UNITED STATES OF AMERICA, APPELLANT,

v.

SAMSON E. SHONDE, APPELLEE.

Appeal from the United States District Court
for the District of Minnesota

[Filed March 23, 1987]

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Judges Ross, John Gibson, Fagg, Bowman and Wollman would have granted the petition.

Petition for rehearing by the panel is also denied.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CR 4 84 74

UNITED STATES OF AMERICA, PLAINTIFF,

v.

S. SHONDE, DEFENDANT.

Minneapolis, Minnesota

October 16, 1984

Transcript of guilty plea before Federal District Judge Miles W. Lord.

APPEARANCES:

Paul Murphy, Assistant U.S. Attorney, for Plaintiff.

Mark Peterson, Minneapolis, Minnesota, for defendant.

MR. MURPHY: Your Honor, this is the United States of America versus Samson Shonde, Criminal 4-84-74. The defendant was indicted in three counts by the Federal Grand Jury. We are here, Your Honor, for purposes of entering and presenting the court with a change of plea under Rule 11 of the Federal Rules of Criminal Procedure, which would be pursuant to an agreement between the parties which is as follows:

The defendant, Mr. Shonde, would enter a plea of guilty to Count Two of the indictment. There would be an agreed maximum term of incarceration the court can impose, of six months. If the court chose to impose a term of

imprisonment, the United States would not object if the court chose work release as an alternative to incarceration at a federal correctional institution. Restitution would be in the discretion of the court. And there would be no fine.

The defendant is ready to proceed under those terms.

The United States is ready to proceed under those terms.

He's in court in person and with his court-appointed counsel—

MR. PETERSON: "Retained".

MR. MURPHY:—"retained", excuse me—Mr. Peterson.

MR. PETERSON: Mark Peterson. That's a correct statement of the negotiation, Your Honor.

THE COURT: I would require him to make the same restitution as Sperry Rand, when they stole 3.6 million dollars—to pay back 10 percent—when we get through, that's what I have in mind, just so you know.

MR. PETERSON: Just so the court is also aware: I am not even sure that there is any restitution here, and I don't know whether Mr. Murphy is. But that certainly is agreeable.

THE COURT: Okay. Step up, sir, right up to the lectern.

EXAMINATION OF DEFENDANT

BY THE COURT:

Q What is it you are pleading guilty to? Tell me about it.

A I pleading guilty to the $1,000.00 in food stamps which I, which I know was wrong at the time, so—

Q How did you happen to do this? Tell me about it.

A Your Honor, I—the lady just, you know, came and, she came—

THE COURT: Hand him the microphone there, Murphy, take it off of there.

A She came to the store, and she—in a manner that, she seemed in difficulty of financial aspects, financial difficulties. And then I told her, I said, "Well, you know, this is not right," at the time. And then she says, "Well," she doesn't want to be kicked out and things like that. And that's how I, that's why I got into it, you know, she, you know, talked me into it, and that's why I got into it.

Q How many stamps did she give you, in dollar value?

A I believe I gave her about $65.00.

Q And how many stamps did she give you in dollar value?

A I believe she brought in $1,005.00.

Q For $65.00?

A That's what she said (nods head in an affirmative manner).

Q And you paid her for them?

A I beg your pardon, sir?

Q You paid her $65.00?

A Yes sir, according to her—she's the one that brought the idea up because she needed the money.

Q Well, you know that you could have a trial and plead not guilty, don't you? You don't have to plead guilty. You understand that?

A Yes, Your Honor, yes.

Q And you could say to the government, "I'm not guilty, call the jury in here and let them decide. You understand?

A Yes, Your Honor (nods head in an affirmative manner).

Q And if we had a jury, it would have to be a unanimous verdict, everybody would have to vote "guilty", you understand that?

A Yes, Your Honor.

Q And they'd be told that you could not be convicted unless they found you guilty beyond a reasonable doubt.

A Yes, Your Honor.

Q And your lawyer could make certain motions; he'd be here to defend you and could argue on your behalf; and you wouldn't have to take the witness stand if you didn't want to.

Do you understand those things?

A Yes, Your Honor.

Q Now you might go to jail for six months under this plea bargain. Do you understand that?

A Yes, Your Honor.

Q And so it's all over, there's no further appeal, once I accept your plea, it's the end of it. You understand that?

A Yes, Your Honor.

Q You can't appeal to anybody, there's no further proceeding except the sentence. Do you understand that?

A Yes, Your Honor.

Q Okay. You've talked this over with you lawyer?

A Yes, I have, Your Honor.

Q And are you satisfied—

THE COURT: Mr. Peterson, are you satisfied that this is appropriate?

MR. PETERSON: Yes, I am, Your Honor.

Q Has the lawyer been available to you and talked to you about these things whenever you wanted to?

A Yes, Your Honor.

THE COURT: All right, Well, I will accept the plea and refer the matter to the probation office for presentence investigation. Thank you.

MR. PETERSON: Thank you, Your Honor.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIV 4-84-74(02)

UNITED STATES OF AMERICA, PLAINTIFF,

v.

AKINSANYA A. COLE, DEFENDANT.

October 17, 1984

TRIAL (Partial Transcript)

Transcript of proceedings before Chief Federal District Judge Miles W. Lord, at Minneapolis, Minnesota, on October 17, 1984.

APPEARANCE:

FOR PLAINTIFFS:
Paul Murphy.

FOR DEFENDANT:
David Skeen.

(Jury not present.)

THE COURT: Mr. Murphy?

MR. MURPHY: Yes sir?

THE COURT: Is the rest of the government's case going to be consistent with this, that this is a one-time thing where the man got no money, he was called upon to do that one transaction? Is that going to be the government's case?

MR. MURPHY: Your Honor, I think the evidence is that he was involved in two transactions.

I think that whether or not you want to believe that—first of all—that he received no money, in fact, is a question that is open to debate.

Whether he intended to receive money from the outset and was simply unsuccessful in obtaining money—if in fact he did not receive any money is another question.

And, frankly, Your Honor, I think that he was involved in this, he was brought into it by his friend—you know, we obviously did not sit with him and find out whether or not he was able to sell some of these stamps and get some money out of them.

THE COURT: Are you going to bring anything in, in addition to that, during your case?

MR. MURPHY: No, Your Honor.

This is going to be the—

THE COURT: All right, the case is dismissed.

Call the jury back here, and I will send them home.

There is no use listening to any more. I am not going to let that go to the jury.

There is nothing personal, Mr. Murphy.

MR. MURPHY: I understand that, Judge.

THE COURT: You could technically make out a case, but it would get no sentence. All he would have is a conviction on his record and get deported.

(Jury present.)

THE COURT: I have been around a long time—34 years—in the law enforcement business, one way of another.

A Judge has supervision over law enforcement.

I have concluded that in this instance the penalty does not fit the crime. This man is a foreign national. He was called upon by one of his countrymen to help him in one instance. There is no proof that he got any money for this. There is proof that he backed away from—no, I guess maybe it was two instances.

There is no proof that this is a pattern of conduct on his part. And if he is convicted he is deported—he is working on his Master's Degree in Business—we send him back to Ethiopia.

There may be welfare cheaters. This man is not on welfare. He monkeyed with this thing. He should not have done that.

But if he were convicted, I would not punish him severely—you know it would be some nominal sentence.

Really the focus was on the grocery man.

This defendant was trying to keep the grocery man out of it, and the grocery man was pulling him in.

So you jurors may agree with me or disagree with me—it does not make any difference because I have already dismissed the case, you see—but if there is another case and he's back in there, they will get him again. I don't think he is. I made that judgment, and there is no use going on any longer.

I asked the government what they were going to prove, and they will prove about what they have proved to now.

That is not any Indictment of Mr. Murphy because he is a very good trial lawyer and a very decent person, and I must say that.

But it is just my judgment, and I have overruled the judgment of the U.S. Attorney in this instance, so the case is over.

I want to thank you for having been here, and there will be no further deliberations or presentation of evidence of any kind.

Thank you, folks.

(Proceedings closed.)

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CR 4 84 74

UNITED STATES OF AMERICA, PLAINTIFF,

v.

S. SHONDE, DEFENDANT.

Transcript of sentencing before Federal District Judge Miles W. Lord at Minneapolis, Minnesota, on December 6, 1984.

APPEARANCES:

F. Hermann, Assistant U.S. Attorney, for Plaintiff.

Mark Peterson, Minneapolis, Minnesota, for defendant.

MR. HERMANN: Your Honor, Samson Shonde is present before this court and is represented by his attorney, Mark Peterson. The matter is before this court for sentencing, and the government moves for imposition of sentence.

THE COURT: Well, Mr. Peterson, before I pass sentence, do you have anything you wish to say on behalf of your client?

MR. PETERSON: Just briefly, Your Honor.

I think that Mr. Smith's report is both complete and accurate—I did notice one thing, when I got back to my office after reading the PSI—there was an agreement that no fine be imposed in this case at the time the plea was entered, and I would request that that correction be made.

The only other thing is that, as the court is aware from reading Mr. Shonde's version of these events, his essential position is that he got involved in this in the first place because the undercover agent came in and indicated that she needed money badly and the only way that she could obtain it was through selling food stamps.

THE COURT: What was that undercover person's name?

MR. PETERSON: I don't recall her name.

THE COURT: Okay, go ahead.

MR. PETERSON: In any event, Mr. Shonde's version of the events provided to Mr. Smith is precisely the same as that provided to me in our conversations, and I wanted the court to know that.

He also requested that I inform the court that, when he met Mr. Smith, he apparently brought with him a number of documents—which he has with him today—indicating that in similar situtations he has helped people financially in the past, and he wanted the court to know that, if the court were interested in seeing that information, he would provide it. I simply was unaware of it prior to this morning.

The only other request that I would make on Mr. Shonde's behalf is that the court, as part of imposing whatever sentence is imposed in this case, direct the Attorney General not to deport Mr. Shonde.

I believe the court has the authority to do that under 8 U.S.C., Section 1251 B.

And I think the presentence investigation shows the fact that he has been in this country for some ten years now, has made —with the exception of this incident—a good adjustment to the American way of life, is working very hard, is trying to support his family—his wife is in the court room—and that deportation would not be appropriate—although the PSI does indicate that Immigration probably is not going to proceed in any event. Thank you.

THE COURT: Well, if I have the capacity to so order, I do so.

MR. PETERSON: Thank you.

THE COURT: Do you have anything to say, Mr. Shonde, before sentence is imposed?

THE DEFENDANT: Your Honor, before God and man, I actually did not have any intention to profit from the trouble in which I am here before you. I simply responded, just like I did, like I have done previously before.

Your Honor, if your lordship would go through these (indicating), this is an example of people that I helped. They kicked them out of the house, they don't have any money to pay for their rent. I—they brought a notice why they would be out of there, and I gave them the money, gave her the money—he and she—gave them the money. And it's the same thing, Your Honor, before God and man, that this lady came to the store and requested I should help her sister and—she's in need of help, she doesn't have no money to pay rent—and that's what I did; not knowing that she is an undercover agent of any kind. I simply responded to her request, her need, just like I did previously. Your Honor, that's why I get in trouble, why I'm here with you.

THE COURT: Very well. Samson Shonde, you have been charged in the indictment with illegal dealing with food stamps, in violation of Title 7 U.S.C. 2024(b) and Title 18 U.S.C. Section 2.

Based on your plea of guilty, it is considered and adjudged that your are guilty.

Therefore, it is adjudged that the imposition of sentence is hereby suspended, and the defendant is placed on probation for a period of two years, on terms and conditions that you comply with local, state and federal laws and the orders of the probation department.

I will, however, require that you pay $746.00 in restitution to the Department of Agriculture.

Now I have indicated that I would indicate to the Immigration Department and order them not to deport you. If that punishment is to follow—if they are to deport him—I will entertain a motion to dismiss this plea of guilty—to withdraw it—and at that point I will dismiss the charge; because I didn't like the way, I didn't think it was fair the way the Department of Agriculture went about this whole process. That's why I dismissed the other person.

MR. PETERSON: Very good, Your Honor.

THE COURT: So if he's going to be deported, you can come back and move to have the plea of guilty withdrawn. I think I still have jurisdiction.

MR. HERMANN: Your Honor, it is my understanding that the undercover agent in this case was Tonia Milam (phonetic).

THE COURT: All right. Thank you.

MR. PETERSON: Your Honor, do I understand that the restitution is payable over the period of probation?

THE COURT: Over the period of probation, yes.

MR. PETERSON: Very good.

MR. HERMANN: I wonder if it would be appropriate for the Court to state on the judgment and commitment regarding the immigration matter, that "not to be deported"?

THE COURT: Well, you folks get together on that, will you please?

MR. HERMANN: Sure.

THE COURT: Okay.

MR. HERMAN: All right.

MR. PETERSON: Yes. Thank you very much.

THE DEFENDANT: Thank you.

MR. HERMANN: Your Honor, we would move for dismissal of the remaining counts of the indictment.

THE COURT: So ordered. Thank you, Mr. Hermann.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CR 4-84-74

UNITED STATES OF AMERICA, PLAINTIFF,

v.

S. SHONDE, DEFENDANT.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MILES W. LORD

APPEARANCES:

For plaintiff: Paul Murphy, Assistant U. S. Attorney

For defendant: Susan Conley

Court Reporter: Ed Rafel

MR. MURPHY: Your Honor, for the record this is U.S. vs. Samson Shonde, Criminal Number 4-84-74.

The record should show the appearance of the United States by Paul Murphy, and the defendant appears in person and with Susan Conley.

MS. CONLEY: That's correct.

MR. MURPHY: This is the first time I have met Ms. Conley, and she is from Central Legal, Incorporated, and representing the defendant in this case.

THE COURT: Where are you from?

MS. CONLEY: Central Legal. It is a nonprofit legal service program on the west side of St. Paul, serving the Hispanic community.

MR. MURPHY: Your Honor, with regard to the Supreme Court Case of Liberata [*sic*], the United States has read that case, and that case really is in accord with the earlier Eighth Circuit cases of U.S. vs. Feltico and United States vs. Marvin, both of which require—under those decisions—that the offenses charged in the case were specific intent crimes and that, if the matter proceeded to the point of instructions to the jury, then the jury had to be instructed with the specific intent instruction.

I don't think that Liberata [*sic*] makes any difference—in this circuit—to the case law. I would say to the court that, based on the transcript of the plea hearing, the defendant indicated not once, but twice, that he knew specifically that it was wrong to do what he was doing. In fact he pointed out to the undercover agent that it was wrong to discount food stamps. So I don't think Liberata [*sic*] is really effective here, Your Honor.

THE COURT: What did the indictment say, do you remember? Does it say "knowingly" and "willfully"?

MR. MURPHY: No, Your Honor, it didn't say "willfully". It said "knowingly" and "intentionally." And I would point out to the court—in that respect—the Marvin case, which is an Eighth Circuit case, sustained the sufficiency of the indictment. It did reverse the case because the court failed to instruct as to specific intent, when the case went to the jury; but the indictment itself read "did knowingly acquire, possess United States Department of Agriculture food stamps", and the Eighth Circuit said that is a sufficient indictment to charge the offense under the statute, and the case requires specific intent but yet they held that was a sufficient indictment.

In this case the indictment filed here charged not only "knowingly use, acquire and transfer", but said "knowingly and intentionally." So I would say to the court that the indictment before the court in this case against Mr. Shonde is stronger, in its language of allegation of intent, than the indictment in the Marvin case—which was sustained by the Eighth Circuit as being a sufficient indictment within the language of the statute charged.

THE COURT: Do you know what's bothering me? Shonde is a pretty good fellow. I think he's a good citizen and—he'll be a good citizen.

We want to deport him.

Then we have a little skunk like the man who just left here, who has never done anything right in his whole life, and we give him free board and room for four or five years and support five of his children by five different women. We should have a deportation mechanism for men like him.

But Shonde here is—I think he'll be a good citizen, a conscientious person, and bright, intelligent, decent.

You better be, Mr. Shonde.

THE DEFENDANT: Yes, I am, Your Honor.

THE COURT: And now we're going to send him off. We won't have a friend here or there.

I don't know exactly what power I have to do anything here.

MR. MURPHY: Well, Your Honor, the government position is this:

You have indicated in your order very specifically and I am sure it has been pointed out to Immigration—that this defendant is not to be deported based on this conviction.

THE COURT: Right.

MR. MURPHY: Now if I understand the pleadings correctly, the defendant has indicated, number one, that there is no deportation proceeding pending presently, that the deportation proceeding was dismissed on April 21st—or

23rd—of this year; that there is presently pending a question of his status with Immigration that, I guess, could ultimately lead to his deportation but—with regard to his marriage, I think—

MS. CONLEY: Right.

MR. MURPHY: That is what is pending before Immigration at the present time.

And the defendant has indicated to the court in the pleadings that, as of the present time, there is nothing to indicate specifically that the defendant is being deported or going to be deported based on the charges that he was convicted of in this case.

I don't think there is any relief that can be granted on those facts.

I would also say to the court that, if it did become evident and it became a matter of proof and record that Immigration was using the conviction in this case in violation of this court's order, to deport this man, then the proper relief is to haul somebody in from Immigration and find out why they are doing it in violation of your order, and make sure that they comply with your order.

I think vacating a sentence and dismissing a charge is a rather drastic remedy for a problem that—first of all—doesn't exist at the present time; and that, if it does come to exist, there is a lesser solution to the problem.

THE COURT: Well, you see, I think that my sentence leaves the Immigration people in a posture where they can do it if they want to, and that my only remedy—I cannot enjoin them from following what they see to be their duty; if they see it to be their duty to use that conviction and to disregard my language, my only remedy is to dismiss the conviction—and that is permanent.

MS. CONLEY: Your Honor, may I speak?

THE COURT: Yes.

MS. CONLEY: As far as the immigration proceedings go, it is correct that Mr. Shonde—in the deportation pro-

ceedings that were commenced against him—he was not charged with violation of immigration laws because of his conviction. He was charged as an overstay on his temporary visa.

The conviction comes into play in the deportation context because he was found deportable at the original hearing and made the request for discretionary relief of adjustment of status based on his marriage to a U.S. citizen, as well as voluntary departure in lieu of deportation.

Now those two discretionary reliefs have an element of good moral character where this conviction comes into play. To be eligible for voluntary departure, which is to leave on your own in lieu of being deported so that your immigration record remains clean, you have to have been a person of good moral character for the five years immediately preceding. I can give you the statutory cites, if you like.

THE COURT: Did Shonde plead guilty before the trial of the other two people?

MR. MURPHY: Yes, Your Honor, he did.

THE COURT: At the trial of the other two people, I dismissed one of the counts on the basis that I didn't think the facts sustained a conviction.

MR. MURPHY: Your Honor, the codefendant in the case was a Mr. Cole, and you dismissed—I think if we pull the record out, pull the transcript out, I think you dismissed—I think you made a remark that you felt that the government had proved its case and that he had done something that he shouldn't have done, but you felt that the penalty was too great in that regard in that case, and you dismissed on those grounds. And there was no other defendant; there was just Mr. Cole.

There was another case, but it was unrelated to this one.

THE COURT: I see. Cole was the fellow that sort of was called in by Shonde, wasn't he?

MR. MURPHY: Yes, Your Honor.

THE COURT: There was not a third person?

MR. MURPHY: There was a third case. That was a Mr. Ballard Wair. Mr. Wair was the gentleman who ran a shoeshine business over at the IDS Building. It was an unrelated and separate matter.

THE COURT: All right, I remember that now.

Well, here is what I am going to do—and I don't think anybody is going to be particularly injured by it.

On the basis of the information that was disclosed during the trial of this case, I conclude that the facts were not sufficient to sustain a conviction of this defendant, and I vacate the plea and dismiss the case.

He's been punished—the punishment that is coming to him, he's had already—and the administrative proceedings that followed.

The conviction on the record is not representative of what I believe to be the man's character, and therefore the conviction is eradicated.

Thank you.

(Proceedings closed)

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EDITOR'S NOTE

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FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREEME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

NO. 87-134

SAMSON E. SHONDE,

Petitioner,

v.

STATE OF MINNEESOTA,

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 46 of this court, petitioner, Samson E. Shonde, asks leave to file the attached petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was presented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court on appeal to the Eighth Circuit Court of Appeals.

Dated: September 23, 1987

Respectfully submitted,

Daniel M. Scott by C.M.M. Cecilia M. Michel

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Attorneys for Respondent

Supreme Court, U.S.
FILED
SEP 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-134

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA,

Petitioner,

v.

SAMSON E. SHONDE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Samson E. Shonde files the instant response in opposition to the Petition for Writ of Certiorari, filed July of 1987.

QUESTION PRESENTED

Was the district court acting within its authority in vacating the respondent's conviction after the government initiated deportation proceedings when the facts show that the district court had entered an order stating that it would reconsider its judgment if deportation proceedings were initiated against the respondent.

STATEMENT OF FACTS

Samson E. Shonde, respondent, is a forty-two-year-old man born on February 18, 1943, in Nigeria. In 1974, Mr. Shonde came to the United States. Presently he is married and has two children. He and his family resided in St. Paul, Minnesota where Mr. Shonde owned and operated Sam's Superette. Mr. Shonde has no prior felony convictions and has never been on parole or probation.

On August 22, 1984, Samson Shonde and Akinsanya A. Cole were indicted in a three count indictment for unlawful dealing in food stamps in violation of Title 7, United States Code, Section 2224(b) and Title 18, United States Code, Section 2.

Samson Shonde pled guilty to count II of the indictment before Federal District Court Judge Miles Lord on October 16, 1984.[1] On the same day, the trial of Mr. Cole began. Judge Lord dismissed the case against Mr. Cole on October 17.

On December 6, 1984, at the sentencing hearing, Mr. Shonde was ordered to pay restitution and was placed on probation for two years. The court also ordered that the defendant not be deported pursuant to the court's authority as provided for in Title 8, United States Code, Section 1251(b). The court also ordered that if any future deportation hearings arose, he would entertain a motion from the defendant to va-

---

[1] The Honorable Miles W. Lord retired on September 11, 1985.

cate his plea of guilty and dismiss the indictment (See Judgment and Commitment Order, Appendix 1, attached). Indeed, the prosecutor at the sentencing hearing specifically asked the court to include language on the judgment and commitment order regarding the "immigration matter:"

> MR. HERMANN [Prosecutor]: I wonder if it would be appropriate for the court to state on the judgment and commitment regarding the immigration matter, that 'not to deport'?
>
> THE COURT: Well, you folks get together on that, will you please?
>
> MR. HERMANN: Sure.
>
> THE COURT: Okay.
>
> MR. HERMANN: All right.
>
> MR. PETERSON: Yes. Thank you very much.
>
> THE DEFENDANT: Thank you.
>
> MR. HERMANN: Your Honor, we would move for dismissal of the remaining counts of the indictment.
>
> THE COURT: So ordered. Thank you, Mr. Hermann.

(Appendix G, p.18a).

Counsel for the government signed the Judgment and Commitment Order as approved, was present at the time of sentencing, and was aware of the court's intention in this regard. No objection to the court's order was voiced by the government at this time. Count I and II of the indictment were dismissed at the time of sentencing.

On February 26, 1985, Mr. Shonde was ordered to appear before the United States Immigration Service to show cause why

he should not be deported. The hearing was continued to April 1985, pending the outcome of his I-130 Petition, a petition filed on his behalf by an immediate family member.

On April 23, 1985, the immigration judge dismissed the deportation hearing and remanded the case to the district director for disposition of Mr. Shonde's adjustment of status application which could have ultimately led to his deportation. (Appendix H, p.21a-22a).[2] The conviction would come into play in the deportation context because Mr. Shonde was found deportable at the original hearing and made a request for discretionary relief of adjustment status based upon his marriage to a United States citizen as well as voluntary departure in lieu of deportation. The two discretionary reliefs have an element of good moral character. To be eligible for voluntary departure, a person must be a good moral character for five years immediately preceding. (See Addendum H, p.22a-23a). Therefore, a criminal conviction would have affected Mr. Shonde's status in this country and possibly any deportation which could have resulted from status adjustment. Before being vacated, the conviction might have been an adverse factor in exercising the discretion with regard to relief from deportation, specifically, in connection with Mr. Shonde's adjustment of status application.

At the time of the government's appeal in 1985, Mr. Shonde's adjustment of status application was being reviewed

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2Hereinafter, Appendix with reference to letters of the alphabet refer to the Appendix filed with the government's Petition for Writ of Certiorari.

by the district director. The fact that application adjustment of Mr. Shonde's status was still pending at the time of the appeal, makes it clear that immigration officials may have been awaiting the outcome of the appeal proceedings, contrary to appellant's assertion that a criminal conviction would not affect the application.

On May 21, 1985, a motion was submitted by Mr. Shonde to vacate the guilty plea and dismiss the charge. On June 7, 1985, notice was given that the motion submitted did not comply with the procedure outlined in Title 28, United States Code, Section 2255. On June 25, 1985, a petition was submitted on behalf of Mr. Shonde pursuant to Title 28, United States Code, Section 2255, requesting that the guilty plea be vacated and the indictment dismissed.

On July 2, 1985, Mr. Shonde appeared for a hearing on a petition before the district court. Based upon all the files, records, and proceedings in this matter, the court vacated Mr. Shonde's plea and dismissed the indictment. On July 24, 1985, the court issued an order vacating Mr. Shonde's guilty plea and dismissed the indictment against him.

The government filed a notice of appeal from the order pursuant to Title 18, United States Code, Section 3731 on August 1, 1985. On appeal, the appellant sought reversal of the order by Judge Lord vacating the guilty plea and dismissing the indictment.

On October 16, 1986, a panel of this court including Chief Judge Lay, Circuit Judge McMillian, and Senior U.S. Dis-

trict Judge Hanson issued its opinion affirming the order of the District Court. United States v. Shonde, 803 F.2d 937 (8th Cir. 1986). (Appendix A, p.1a).

Petitioner submitted a petition for rehearing en banc. Mr. Shonde opposed the petition. The United States Eighth Circuit Court of Appeals considered the petition and denied it. Petition for rehearing by the panel was also denied. (Appendix D, p.7a).

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari in this matter is nothing more than a bold attempt by the Justice Department to assert the power of the executive branch over the power of the judicial branch. It is respondent's position that this is not one of the important or special cases which is appropriate for review by the United States Supreme Court.

Rule 17 of the Rules of the Supreme Court clearly states that:

> A review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefore.

"Special and important reasons to relate problems beyond the academic or the episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1957). The unique factual circumstances of this case and the issues arising therefrom were properly resolved by the District Court and affirmed by the Eighth Circuit Court of Appeals.

The government in this case, while it is free to re-indict the respondent, has chosen to deplete the resources of the judiciary in the Eighth Circuit Court of Appeals and now in the United States Supreme Court by bringing this matter for review again. As the case now stands, the United States Attorneys' Office is free to seek indictment of the respondent on the same facts alleged in the indictment which was dis-

missed. Indeed, the government could have immediately sought reindictment of Mr. Shonde once the district court's order was filed. Instead, the actions of the government have caused extensive expenditures of the resources of the judiciary in continuing to question the district court's order. The government is not prejudiced by the district court's order and has another alternative to resort to other than a Petition for Writ of Certiorari. This is a fact which the petitioner has failed to divulge to this court. The government's action in this case reflects a disregard for judicial authority as well as its own prosecutor's actions in approving the judge's order.

At the sentencing hearing the government tacitly approved the language below at the sentencing hearing and proposed it be inserted in the judgment and commitment order of which the government now complains. The prosecutor approved the language by his signature below it, which preceded the court's signature:

> It is further ordered that the defendant is not to be deported under this court's authority in Title 8, United States Code, Section 1251(b). If any deportation proceedings arise in the future, this court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge.

(Judgment and Commitment Order, Appendix 1, attached).

The government may not now legitimately complain of an action which the court took when the order was breached by the initiation of deportation hearings:

> Because the government breached the order by bringing deportation proceed-

> ings, it was appropriate for the district court to entertain Shonde's motion to vacate his plea of guilty and dismiss the indictment.

United States v. Shonde, 803 F.2d 937 (8th Cir. 1986), also Appendix A, p.3a.

Initially, the government presents a discussion of statutory authority as the basis for the first reason for granting the writ. However, this ignores the prosecutor's initial actions and acquiescence to the judge's order at sentencing. Petitioner's point that the deportation proceeding at issue was not commenced under a particular statute is not illuminative. The court's order specifically stated "any deportation proceedings." (emphasis added). See Appendix 1, attached. There was a violation of the judge's order, contrary to petitioner's assertion. The court had inherent authority to enter its order as affirmed by the appellate court in United States v. Shonde, 803 F.2d 937, 938 (8th Cir. 1986).

The government relies heavily on the case of United States v. Addonizio, 442 U.S. 178 (1979), a case dealing with issues of the court's jurisdiction versus that of the United States Parole Commission. It should be noted that this case is distinguishable for many reasons, most notably, because the respondent was not on parole, but rather on probation. A probationer remains within the district court's jurisdiction, while a parolee does not. Therefore, contrary to what petitioner states, the principles in Addonizo do not apply here. Therefore, petitioner's leap that the court's order

violated the Addonizo principles does not provide a sufficient reason to warrant this court's review.

The government's second reason for granting the writ is insufficient also. Contrary to petitioner's assertion that there was no claim that respondent's plea was not voluntarily and intelligently entered in this case, the respondent did raise this issue in its brief to the United States Eighth Circuit Court of Appeals. See Appendix 2 (attached, incorporating Mr. Shonde's response as appellee in the court below). Respondent's plea did not fully comply with Rule 11 of the Federal Rules of Criminal Procedure. (Appendix E, p.8a-11a).

The petitioner's editoral footnote number four of the petition improperly asserts a collateral issue by stating that, "The court's comments at the time of the codefendant's trial [indicated] that the court did think the facts were sufficient to sustain a conviction of respondent." (Petition, p.15). The issue is whether the district court properly vacated the guilty plea. The court of appeals correctly held that because the government breached the order, the district court's order was appropriately made.

Finally, the Petitioner complains of the court's action in dismissing the indictment, stating that prosecution decisions are committed to the executive branch. Nevertheless, as stated, the petitioner has failed to exercise its own prosecutorial power to re-indict respondent. There has never been an impediment by the court's order to the government's power to do so. It appears the government has decided not to re-

indict Mr. Shonde and instead has chosen to attempt to assert the power of the executive branch over the judicial branch.

There is no "unprecedented shift of authority" as the petitioner characterizes this matter. Rather there is a concerted effort on the part of the government to overrun the power of the judiciary. This is most evident in the prosecutor's refusal to exercise the option of re-indictment. The court's action was tailored to this specific case under particular circumstances of which the government was well aware.

CONCLUSION

Based on the record, the decision of the Eighth Circuit Court of Appeals, and the arguments herein, respondent, Samson E. Shonde, requests that the instant Petition for Writ of Certiorari be summarily denied.

Dated: September 23, 1987

Daniel M. Scott by cmm

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Attorneys for Respondent

APPENDIX

United States of America vs.

United States District Court for

DEFENDANT: SAMSON F. SHONDE

DISTRICT OF MINNESOTA - FOURTH DIVISION

DOCKET NO.: CRIMINAL 4-84-74(01)

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: December DAY: 6 YEAR: 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Mark W. Peterson
(Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, Count II [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of illegal dealing in food stamps as set forth in Count II, in violation of Title 7, United States Code, Section 2024(b) and Title 18, United States Code, Section 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that ~~[illegible]~~ The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of two (2) years, upon the following terms and conditions:

1. That he comply with all local, state and federal law;

2. That he comply with the rules and regulations of the probation department.

SPECIAL CONDITIONS OF PROBATION

It is ordered that the defendant pay $746.00 in restitution to the Dept. of Agricult

It is further ordered that the defendant is not to be deported under this Court's authority provided in Title 8, United States Code, Section 1251(b). If any deportation proceedings arise in the future, this Court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

APPROVED:

Francis X. Hermann, Assistant U.S. Attorney

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Miles W. Lord

Miles W. Lord Date Dec. 7th 1984

APPENDIX 1

In The

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 85-5282-MN

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

SAMSON E. SHONDE,

Appellant.

Appeal from the United States District Court for the

District of Minnesota, Fourth Division

BRIEF OF APPELLANT

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Attorney for Appellant

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellee requests oral argument not to exceed ten minutes. Mr. Shonde respectfully disagrees with appellant's contention that there is no need for oral argument and maintains that the law and the facts support the decision of the district court.

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STATEMENT OF THE ISSUE

WHETHER THE COURT PROPERLY ENTERED THE ORDER AND JUDGMENT VACATING APPELLEE'S GUILTY PLEA AND DISMISSING THE INDICTMENT.

United States v. Buckhanon, 505 F.2d 1079 (1974)

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969)

Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976)

Marteney v. United States, 216 F.2d 760 (10th Cir. 1954)

STATEMENT OF THE FACTS AND CASE

Samson Shonde is a 42 year old man born on February 18, 1943 in Nigeria. While living in Nigeria, Mr. Shonde served in the military as a communication efficiency officer and trained solders from 1966 to 1974. In 1974 Mr. Shonde came to the United States. Presently he is married and has two children. He and his family reside in St. Paul, Minnesota, where Mr. Shonde owns and operates Sam's Superette. Mr. Shonde has no prior felony convictions and has never been on probation or parole.

On August 22, 1984, Samson E. Shonde and Akinsanya A. Cole were indicted in a three count indictment for unlawful dealing in food stamps in violation of Title 7, United States Code, Section 2024(b) and Title 18, United States Code, Section 2.

Samson Shonde pled guilty to Count II of the indictment before Federal District Judge Miles Lord on October 16, 1984. On that same day the trial of Mr. Cole began. Judge Lord dismissed the case on October 17 because the facts didn't sustain a conviction. (Addendum I, page 7).

On December 6, 1984, at the sentencing hearing, Mr. Shonde was ordered to pay restitution and received two years probation. Judge Lord also ordered that the defendant not be deported, pursuant to the court's authority as provided for in Title 8, United States Code, Section 1251(b). The Court also

ordered that if any future deportation hearings arose, he would entertain a motion from the defendant to vacate his plea of guilty and dismiss the indictment, see judgment and commitment order, Addendum D. Counsel for the government was present at that time and aware of the Court's intention. Count I of the indictment was dismissed at the time of sentencing. (Addendum C).

On February 26, 1985, Mr. Shonde was ordered to appear before the United States Immigration Service to show cause why he should not be deported. The hearing was continued to April, pending the outcome of his I-130 petition (a petition filed on his behalf by an immediate family member).

On April 23, 1985, the immigration judge dismissed the deportation hearing, and remanded the case to the district director for disposition of Mr. Shonde's adjustment of status application which could ultimately lead to his deportation. (Addendum I, page 5). The conviction would come into play in the deportation context because Mr. Shonde was found deportable at the original hearing and made a request for discretionary relief of adjustment status based on his marriage to a United States citizen, as well as voluntary departure in lieu of deportation. The two discretionary reliefs have an element of good moral character where the conviction would come into play. To be eligible for voluntary departure, a person must be of good moral character for the five years immediately preceding. (See Addendum I, 6-7). Therefore a criminal con-

viction would affect Mr. Shonde's status in this country and possibly any deportation which results from status adjustment. Before its being vacated by Judge Lord, the conviction might have been an adverse factor in exercising discretion with regard to relief from deportation, specifically, in connection with Mr. Shonde's adjustment of status application. Mr. Shonde's adjustment of status application is currently being reviewed by the district director. The fact that application adjustment of Mr. Shonde's status is still pending makes it clear that immigration officials may be awaiting the outcome of these proceedings, contrary to appellant's assertion that a criminal conviction will not affect the application.

On May 21, 1985, a motion was submitted by Mr. Shonde to vacate the guilty plea and dismiss the charge, as per judicial recommendation. On June 7, 1985, notice was given that the motion submitted did not comply with judicial procedure as outlined in Title 28, United States Code, Section 2255. On June 25, 1985, a petition was submitted on behalf of Mr. Shonde pursuant to Title 28, United States Code, Section 2255, requesting that the guilty plea be vacated and the indictment be dismissed.

On July 2, 1985, Mr. Shonde appeared for a hearing on the petition before Judge Miles Lord. Based upon all the files, records and proceedings in this matter Judge Lord vacated Mr. Shonde's plea and dismissed the indictment. On July 24, 1985,

Judge Lord issued an order vacating Mr. Shonde's guilty plea and dismissing the indictment against him.

The government filed a notice of appeal from Judge Lord's order pursuant to Title 18, United States Code, Section 3731 on August 1, 1985. On appeal, appellant seeks reversal of the order and judgment vacating the guilty plea and dismissing the indictment.

Mr. Shonde opposes reversal of the order and judgment on the ground that the same were properly decided.

ARGUMENTS

I.

THE DISTRICT COURT PROPERLY VACATED APPELLEE'S GUILTY PLEA AND PROPERLY DISMISSED THE INDICTMENT.

Contrary to the appellant's statement that Judge Lord issued an order "stating no reasons", the order issued on July 24 was the culmination of over a year's worth of proceedings in this matter. Mr. Shonde was indicted in August of 1984. It was not until over nearly a year later in July of 1985 that Judge Lord made his decision to vacate the guilty plea and dismiss the indictment. The decision was based upon all of the files, records and proceedings in this matter. (See Addendum J). The order is not unlike other judicial orders in which the district court judge records in writing his decision on the merits of the proceeding before him. Indeed, Judge Lord made a considered judgment in this case after listening to the arguments of counsel as well as the facts presented in the trial of the co-defendant Cole. Judge Lord had the opportunity to view the evidence which the government presented at trial, listen to the government witnesses, and access the credibility of testimony. Thus Judge Lord had more than the cold record upon which to base his decision. He had a working knowledge of the entire record. The district court's findings in a habeas corpus proceeding must prevail unless found to be clearly erroneous. Mobley ex. rel. Ross v. Meek, 531 F.2d 924, 927 (8th Cir. 1976), rev'd on other grounds

429 U.S. 28, 97 S.Ct. 202; Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981). The rule in both civil and criminal cases is that even if the basis of trial court's decision is erroneous, such decision will be affirmed if the record reveals another ground which supports the decision. Scivally v. Time Insurance Company, 724 F.2d 101, 103 (10th Cir. 1983); California Bankers Association v. Shultz, 94 S.Ct. 1494, 1522, 416 U.S. 21, 71 (1974); United States v. Buckhanon, 505 F.2d 1079, 1083 (1974) (evidence admitted for erroneous reason still admissable under another reason).

Judge Lord had the benefit of listening to Agent Milam who testified at the Cole trial. The words attributed to Mr. Shonde on page 5 of the appellant's brief are presented by appellant as direct quotations from Mr. Shonde. However, there is no support in the record identified by the government for such attribution. Indeed the testimony attributed to Mr. Shonde came from Agent Milam's testimony and not directly from Mr. Shonde. Indeed Mr. Shonde was not present at the Cole trial and did not have an opportunity to cross-exam the witnesses or speak for himself at the Cole trial. Even so, Judge Lord, an experienced trial judge adduced that the evidence was insufficient to support a conviction in that case. (See Addendum I, page 7).

The government concedes after a lengthy discussion of the testimony adduced at Cole's trial that the evidence presented at Cole's trial may have been insufficient. Stating that the sufficiency of the evidence was irrelevant to the case at hand, the

appellant indicates that it was relieved of the burden of proving each element of the offense beyond a reasonable doubt with respect to Mr. Shonde's case, inferring that the plea of guilty was valid.

Under Rule 11 of the Federal Rules of Criminal Procedures, the district court judge has the power to accept or reject a plea agreement, Federal Rules of Criminal Procedures, Rule 11(e)(2). Perhaps the foremost requisite of a valid plea of guilty is the requirement that the judge be satisfied that there is a factual basis for the plea. After considering this matter and reviewing all of the files and records in the case and listening to the arguments of counsel as well as information disclosed during the trial, Judge Lord found that the facts were not sufficient to sustain Mr. Shonde's conviction. (Addendum I, 8). Federal Rules of Criminal Procedures, Rule 11(f).

Like all waivers of constitutionally protected rights, a plea of guilty is valid only if made knowingly, voluntarily and intelligently. Thundershield v. Solem, 429 F.Supp. 944, 949, affirmed 565 F.2d 1018, cert denied 435 U.S. 954, 98 S.Ct. 1585 (D.C. S.D. 1977) citing Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582 (1927). Circumstances which remove the voluntary character of the plea, or indicate that the plea was not knowingly made, leave the plea open to collateral attack. See McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969), involving the proper interpretation and application of Rule 11 in federal courts. The circumstances of this case reveal an invalid plea of

guilty which was properly vacated by Judge Lord. This is not a case involving a seasoned criminal with extensive experience in court proceedings. Mr. Shonde has no other experience with the criminal justice system other than this matter. He is a foreigner whose native language is not English and cannot be presumed to have the familiarity with the court as a native might have. Indeed what little record there is of Mr. Shonde responding in a narrative manner in open court reveals a pattern of broken thoughts. (See Addendum B, page 3). In this case, the requirements of Rule 11 were not met and therefore the plea was invalid and properly vacated.

Rule 11 has two purposes as stated by the United States Supreme Court in McCarthy. The first purpose is to ensure that the guilty plea is truly voluntary and the second purpose is to produce a complete record of the factors relevant to the voluntariness determination. Rule 11 requires a determination that the guilty plea is truly voluntary and also requires production of a complete record of the factors relevant to the voluntariness at the time the plea is entered. In McCarthy the court said that in addition, Rule 11 requires that the judge satisfy himself that there is a factual basis for the plea. Mr. Shonde asserts that this was not done in his case. In this case there is no indication on the record that Mr. Shonde was ever informed of the maximum penalty allowable under law for violation of the statute, nor is there an indication on the record that Mr. Shonde had a right to testify at trial if he chose. Neither was

there an indication that the government could not draw any inferences or make any remarks regarding Mr. Shonde's decision should he not testify. Nor was Mr. Shonde told that he would have access to the subpoena power of the court should he require it. Nor was there an inquiry into the state of mind of Mr. Shonde at the time of the change of plea. There is no on the record indication that Mr. Shonde was of a clear mind or that he understood the specific elements of the offense charged. Additionally, Mr. Shonde was not sworn when he made his statements. Nor was Mr. Shonde told that even if the jury returned a unanimous verdict of guilty, that he would have a right to appeal his convicton to a higher court, the Eighth Circuit Court of Appeals. Nor was Mr. Shonde told on the record that it was the government's burden to prove beyond a reasonable doubt each and every element of the crime charged and that he did not have to present any evidence or any witnesses or testify himself. There is no on the record indication that Mr. Shonde had the right to confront his accusers through his attorney's cross-examination of the government witnesses. There is no record that other promises were not included in the plea agreement. Nor is there any indication on the record that Mr. Shonde was not under the influence of any drugs or alcohol when he tendered his change of plea. Finally, there is no indication on the record that the plea was not induced by any threats or promises. (Addendum C).

The Court in McCarthy ruled that the failure to comply with Rule 11 deprives the criminal defendant of the rule's procedural

safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. McCarthy, supra at 471-472. The United States Supreme Court in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253 (1976) indicated that a plea made be involuntary in the constitutional sense if made without an understanding of the constitutional protections waived, or if made with such an incomplete understanding of the charges that it was not an intelligent admission of guilt. Henderson, supra, at 645, n. 13, 96 S.Ct. 2253.

Judge Lord's finding that there was insufficient information to support the conviction together with the incomplete record of the constitutional protections waived at the change of plea hearing supports Judge Lord's order vacating the guilty plea. The order should properly stand and Mr. Shonde respectfully requests that this Court affirm the order and judgment.

Further, Mr. Shonde contends that the indictment in this case was insufficient at law for failure to clearly state the mens rea requirement. A judge can dismiss an indictment which is insufficient at law when the defendant has pled guilty. Marteney v. United States, 216 F.2d 760, 762 (10th Cir. 1954). "One cannot plead guilty to an offense which is not affirmatively stated in the charge." The defendant in Marteney was convicted of violating Title 18, United States Code, Section 2314. After he was sentenced on his plea of guilty, he moved to arrest judgment on the ground that the indictment failed to charge a federal offense. The trial court refused to grant the motion. Subsequent-

ly, the Court of Appeals reversed the trial court, holding that the indictment was insufficient.

In United States v. Opsta, 659 F.2d 848 (8th Cir. 1981), the Court held that in order for an indictment to be sufficient, it must set forth the essential elements of the offense. In Opsta, the defendant was convicted of involuntary manslaughter. The indictment did not state intent as a specific element. The Court held failure of the indictment to allege criminal intent required dismissal of the indictment and reversal of the conviction.

The government relies on the case of Perry v. United States, 576 F.2d 158 (8th Cir. 1978) and states that any claim made by Mr. Shonde that the indictment was insufficient was waived by his guilty plea. However, although the Court of Appeals ruled against the defendant in that case, it did not preclude the defendant from exercising his constitutional rights and challenging the entry of his plea after sentencing. "It is elementary in American jurisprudence that an indictment must set forth the essential elements of the offense charged and if it does not, a conviction based thereon is fatally defective." United States v. Denman, 483 F.2d 1093, 1095 (8th Cir. 1973).

The appellant contends that Judge Lord erroneously dismissed the indictment. Even if this were the case, the dismissal was harmless error in that it did not prejudice the appellant. United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977); United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v.

Richards, 723 F.2d 646 (8th Cir. 1983); United States v. Yeo, 739 F.2d 385 (8th Cir. 1984). Appellant at the present time has the option of bringing the matter before the grand jury and attempting to obtain another indictment. Any error in this case is harmless error in that it did not prejudice the appellant.

CONCLUSION

For the foregoing reasons, the appellee respectfully requests that the order and judgment of the district court be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

SAMSON E. SHONDE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Respondent does not make any serious attempt to defend the actions of the district court, as affirmed by the court of appeals. Instead, respondent makes two collateral arguments as to why the court should not grant certiorari in this case. Neither argument has merit.

1. Respondent argues (Br. 7-8, 10-11) that this case is unworthy of review because the government can simply reindict respondent. That is both irrelevant and wrong. It is irrelevant because the power of a district court judge to set aside a conviction, vacate a guilty plea and dismiss an indictment does not turn on whether or not the prosecution can start over again from scratch. It is wrong because, in dismissing the indictment, the district court clearly stated that his dismissal order was final (*i.e.*, with prejudice). In discussing how to prevent respondent from being deported, the district court said: "[M]y only remedy * * * is to dismiss the conviction—and that is permanent" (Pet. App. 22a).

2. Respondent also contends (Br. 8-9) that the government tacitly approved, in advance, all the district court's actions by signing the judgment and conviction order, which stated, in pertinent part: "If any deportation proceedings arise in the future, this Court will entertain a motion from the defendant to vacate his plea of guilty and dismiss the charge." The prosecutor's action did not have that effect. We are advised by the United States Attorney that, under local practice in federal court in Minnesota, the judgment and conviction order is sent to the prosecuting attorney for his signature to ensure that the order corresponds to the district court's directions at the time of sentencing. It is a way of double-checking the transcription of the court's instructions, not an opportunity for the attorney to express agreement or disagreement with the sentence given. This ministerial act cannot be said to have waived any objections to the order as written.

Nor do the statements of the Assistant United States Attorney at the time of sentencing constitute such a waiver. It is clear from the transcript (Pet. App. 18a) that the prosecutor raised no objection to an instruction to the Immigration and Naturalization Service that respondent's conviction not be used against him in any future deportation proceedings. But he can in no sense be said to have acquiesced in the series of subsequent actions taken by the district court. The government in fact directly and vigorously opposed those actions (Pet. App. 21a-22a).

For the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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